FOR ARGUMENT

No. 93-981

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent is incorrect in contending (Resp. Br. 3-7) that the question presented here—whether the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act—has already been answered in *United States* v. *Felix*, 112 S. Ct. 1377 (1992). *Felix* did not address the overt act issue at all, and the *Felix* Court's resolution of the double jeopardy issue before it did not require it to answer the question presented here, either explicitly or implicitly.

The Court in *Felix* held that the Double Jeopardy Clause did not bar the prosecution of Felix for drug conspiracy under Section 846, even though the conspiracy charge against Felix alleged, and the government proved at trial, two overt acts that formed the basis for previously charged substantive drug

offenses. 112 S. Ct. at 1383-1385. The Tenth Circuit had reversed Felix's conspiracy conviction, relying on this Court's statement in *Grady* v. *Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause bars a subsequent prosecution in which the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *United States* v. *Felix*, 926 F.2d 1522, 1527 (1991) (quoting *Grady* v. *Corbin*, 495 U.S. at 521). In reversing the Tenth Circuit's judgment, the Court in *Felix* recognized that the statement in *Grady*, "[t]aken out of context, and read literally, * * * supported [Felix's] defense of double jeopardy." 112 S. Ct. at 1383-1384. The Court refused, however, to read that statement "so expansively." *Id.* at 1384. Instead, it chose "to adhere to the * * * line of cases" establishing "the rule that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes." *Id.* at 1384-1385.

Respondent contends (Resp. Br. 2) that the Court in *Felix* "necessarily determined that section 846 requires [proof of] an overt act as an essential element" when it found that the prosecution of Felix would have been barred under an "expansive[]" reading of *Grady*. *Felix*, 112 S. Ct. at 1383-1384. Respondent reasons that, if an overt act were not an essential element of a Section 846 conspiracy, it could not be said that the government in *Felix* relied on the overt acts alleged in the indictment "to establish an essential element of [the] offense charged in that prosecution." *Grady* v. *Corbin*, 495 U.S. at 521.

Contrary to respondent's claim, it was not necessary for the Court in *Felix* to assume that proof of an overt act is required under Section 846 in order for the Court

to conclude that Felix's prosecution would have been barred under an "expansive[]" reading of *Grady*. *Felix*, 112 S. Ct. at 1383-1384. That is clear from the Tenth Circuit's decision in *Felix*. Although a majority of the Tenth Circuit panel held that Felix's prosecution was barred under *Grady*, it was "mindful that 21 U.S.C. § 846 does not require proof of an overt act in the prosecution of a drug conspiracy." *Felix*, 926 F.2d at 1529 n.7. The panel majority based its holding on the fact that the government had relied on proof of overt acts "to show the criminal agreement for the conspiracy." *Ibid.* Thus, the panel majority reasoned that the prosecution fell within *Grady* not because the overt acts themselves were essential elements of the conspiracy offense, but because they were used as evidence of an essential element: an agreement to violate the drug laws.

In dissenting from the panel majority's holding in *Felix*, Judge Anderson agreed with the majority that "[a]n overt act is *not* a *necessary* element of conspiracy" under Section 846. *Felix*, 926 F.2d at 1536 (internal quotation marks omitted). Furthermore, Judge Anderson found it "arguable" that, as the majority had held, "the two overt acts, while not themselves an essential element, were introduced by the prosecution to *establish* an essential element: the agreement to violate the drug laws." *Ibid.* He concluded, however, that upon "[c]areful scrutiny," the overt acts "did not meaningfully 'establish'" the existence of the agreement, because the "crux" of the conspiracy concerned the establishment of a methamphetamine lab in Beggs, Oklahoma, whereas the overt acts "encompass Felix's illegal activity *after* the government seized the Beggs lab" and did not directly implicate Felix's co-conspirators. *Ibid.*

Before this Court, the parties in *Felix* agreed that Section 846 does not require proof of an overt act. See

90-1599 U.S. Br. 24 ("21 U.S.C. 846 does not require proof of an overt act"); 90-1599 Tr. of Oral Arg. 45 (counsel for respondent agrees that proof of an overt act is "not an essential element of the crime" proscribed in Section 846). No contrary view was expressed in either the Chief Justice's opinion for the Court or Justice Stevens' opinion concurring in part and concurring in the judgment of the Court. Indeed, Justice Stevens stated that "there is no overt act requirement in the federal drug conspiracy statute." 112 S. Ct. at 1386 (Stevens, J., joined by Blackmun, J., concurring in part and concurring in the judgment). Because the Court in *Felix* could conclude, as did both the majority and dissenting judges in the court of appeals, that Felix's prosecution was arguably barred under *Grady* even though Section 846 did not require proof of an overt act, there is no merit to respondent's contention (Resp. Br. 6) that "[i]n order for this Court to now hold that the federal drug conspiracy law requires no overt act, this Court would have to dismiss as dicta its purported holding in *Felix*."[1]

[1] Likewise without merit is respondent's contention (Resp. Br. 6) that *Felix* casts doubt on earlier lower court decisions holding that Section 846 does not require proof of an overt act. Since this Court's decision in *Felix*, numerous courts of appeals have reaffirmed earlier decisions holding that Section 846 does not require proof of an overt act. See, *e.g.*, *United States* v. *Rodgers*, 18 F.3d 1425, 1429 (8th Cir. 1994); *United States* v. *Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993), cert. denied, No. 93-8581 (June 20, 1994); *United States* v. *Price*, 13 F.3d 711, 724 (3d Cir.), cert. denied, 114 S. Ct. 1863 (1994) & Nos. 93-9109, 93-9206 (June 27, 1994), and petition for cert. pending, No. 93-9557 (filed June 9, 1994); *United States* v. *Ivory*, 11 F.3d 1411, 1415 (7th Cir. 1993); *United States* v. *Banks*, 10 F.3d 1044, 1050 (4th Cir. 1993), cert. denied, 114 S. Ct. 1850 (1994) & No. 93-8056 (June 13, 1994); *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993); *United States* v. *Rangel-Arreola*, 991 F.2d 1519, 1522 n.2 (10th Cir. 1993); *United States* v. *Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992).

2. Our primary submission is that Congress's omission of an overt act requirement in Section 846 reflects Congress's intent not to require proof of an overt act under that statute. As we explained in our opening brief (at 8-12), two circumstances compel that conclusion. First, Congress expressly required proof of an overt act in at least 20 current conspiracy statutes, including the general conspiracy statute, 18 U.S.C. 371. The inclusion of an express overt act requirement in so many statutes shows that when Congress intended to require proof of an overt act, it knew how to do so. By the same token, the omission of an express overt act requirement in Section 846 indicates that Congress did not intend to require such proof under that statute.[2] Second, in accordance with a "cardinal rule of statutory construction," *Molzof* v. *United States*, 112 S. Ct. 711, 716 (1992), it must be presumed that Congress intended to adopt the common law rule that proof of an overt act is not required to establish a conspiracy. Nothing in respondent's brief casts doubt on our submission.

[2] See *Custis* v. *United States*, 114 S. Ct. 1732, 1736 (1994) (in light of Congress's inclusion of language in 21 U.S.C. 851(c) expressly authorizing defendants at sentencing to challenge prior convictions used for sentence enhancement, the omission of similar language in 18 U.S.C. 924(e) indicates that Congress did not intend to permit such challenges in sentencing under that provision); *Lukhard* v. *Reed*, 481 U.S. 368, 376 (1987) ("the fact that Congress was silent in the AFDC statute but has elsewhere been explicit when it wished to exclude personal injury awards from income tends to refute rather than support a legislative intent to exclude them from AFDC computations") (opinion of Scalia, J.).

a. Respondent answers our first point with a non sequitur. He argues that Section 846 should be construed to require proof of an overt act, even though it does not expressly require such proof, because many other federal conspiracy statutes do expressly require such proof. Resp. Br. 22. That argument, however, cuts the other way: this Court has made clear that significance should be accorded to Congress's omission of a requirement in one statute that it has expressly included in other statutes. See note 2, *supra*; see also, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Respondent's argument might have some force if Section 846 were the only federal conspiracy statute in which Congress had ever omitted an express overt act requirement, and there were evidence that the omission was inadvertent. The omission of an overt act requirement in Section 846 is far from exceptional, however, and there is no evidence that the omission was inadvertent. Contrary to respondent's assertion that the "vast majority" of other federal conspiracy statutes expressly require proof of an overt act (Resp. Br. 22), most federal conspiracy statutes do not expressly require such proof. See Pet. 14 n.9.

b. Respondent challenges the premise of our second point, arguing that proof of an overt act was required to establish a conspiracy at common law. Resp. Br. 8-11. That challenge is without merit.

First, this Court has consistently recognized that proof of an overt act was not required to establish a conspiracy at common law.[3] The commentators

[3] See *Collins* v. *Hardyman*, 341 U.S. 651, 659 (1951); *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946); *Nash* v. *United States*, 229 U.S. 373, 378 (1913); *Hyde* v. *United States*, 225 U.S. 347, 359 (1912); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905); *Bannon* v. *United States*, 156 U.S. 464, 468 (1895); see also *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *O'Connell* v. *United States*, 253 U.S. 142 (1920).

uniformly agree that no such proof was required to establish a common law conspiracy.[4] None of the sources cited by respondent supports a contrary conclusion.[5]

[4] American Law Institute, *Model Penal Code and Commentaries* § 5.03, cmt. 5, at 452 (1985); J. Bryan, *The Development of the English Law of Conspiracy* 55-65 (1909); H. Carson, *The Law of Criminal Conspiracies and Agreements, As Found in the American Cases* 92-93 (1887); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.5(c), at 93 (1986); R. Wright, *The Law of Criminal Conspiracies and Agreements* 6 (1887); K. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 Vand. J. Transnat'l L. 951, 959 n.48 (1993); A. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 406 n.5 (1959); B. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 338 (1947); F. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 425 (1922); Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 945-946 (1959); see also 4 *Stephen's Commentaries on the Laws of England* 166 (L. Warmington ed., 21st ed. 1950); 8 W. Holdsworth, *A History of English Law* 380 (1926); A. Harno, *Intent in Criminal Conspiracy*, 89 U. Pa. L. Rev. 624, 625 (1941).

[5] Respondent asserts that the crime of conspiracy "first emerged" from three statutes enacted during the reign of King Edward I (First Ordinance of Conspirators (1292), 20 Edw. I; Second Ordinance of Conspirators (1300), 28 Edw. I; and Third Ordinance of Conspirators (1304), 33 Edw. I), and that, under those statutes, proof of an overt act was required to establish a conspiracy. Resp. Br. 8-9. In fact, commentators disagree whether conspiracy was a crime at early common law. Compare, *e.g.*, 2 Coke, *Institutes* 561, 562 (1817) (Ordinance of 33 Edw. I "was but an affirmance of the common law") with 2 W. LaFave & A. Scott, *supra*, § 6.4(a), at 60-61 ("The crime of conspiracy [was] unknown to the early common law."); see also 3 W. Holdsworth, *A History of English Law* 401 (1923) ("Though some writers have thought that [a writ of conspiracy] existed at [early] common law, * * * it [is] very much more probable that it owes its origin to the[] [Edwardian] statutes." (footnote omitted)). The commen-

Moreover, Congress has consistently indicated that it shares this Court's understanding of common law conspiracy. Congress included an express overt act requirement when it enacted the first general conspiracy statute in 1867. See U.S. Br. 9 n.6. By doing so, Congress evinced an intention to "change[] the common law" by "requiring an overt act to be alleged and proved." *Bannon* v. *United States*, 156 U.S. 464, 468 (1895). That intention reflected Congress's understanding that proof of an overt act was not required at common law. Likewise, Congress's subsequent inclusion of an express overt act requirement in some conspiracy statutes, but not in others, demonstrates Congress's understanding that, in the absence of an express overt act requirement in the text of the statutes, those statutes would be construed to punish conspiracies "on the common law footing," *Singer* v. *United States*, 323 U.S. 338, 340

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tators agree, however, that the common law came to recognize an offense of conspiracy that was broader than the types of conspiracy punished under the Edwardian statutes and that did not require proof of an overt act. See J. Bryan, *supra*, at 15; 3 W. Holdsworth, *supra*, at 406 & n.10; R. Wright, *supra*, at 6; Sayre, *supra*, 35 Harv. L. Rev. at 397 n.11. The principle that proof of an overt act was not required to establish a conspiracy at common law was authoritatively established in 1611 by the Court of Star Chamber in *Poulterers' Case*, 9 Co. Rep. 55b. See J. Bryan, *supra*, at 57, 65; 11(1) *Halsbury's Laws of England* ¶ 64, at 59 (4th ed. reissue 1990); R. Wright, *supra*, at 6; Goldstein, *supra*, 68 Yale L.J. at 415-416; Harno, *supra*, 89 U. Pa. L. Rev. at 626; Sayre, *supra*, 35 Harv. L. Rev. at 398; Note, *Developments*, *supra*, 72 Harv. L. Rev. at 923. That principle was thereafter consistently recognized in the United Kingdom and the United States. See, *e.g.*, *Rex* v. *Best*, 6 Mod. 185 (1705); *State* v. *Buchanan*, 5 H. & J. 317 (Md. 1821); see also H. Carson, *supra*, at 100 (*Buchanan* "has always been considered a leading American authority" on common law of conspiracy).

(1945), quoting *Nash* v. *United States*, 229 U.S. 373, 378 (1913), *i.e.*, without requiring proof of an overt act, see, *e.g.*, *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946).

c. Respondent asserts that "in practice overt acts [have been] pled in indictments or given to defendants in bills of particulars as a matter of right." Resp. Br. 2. That assertion, even if true, is irrelevant. The fact that a prosecutor alleges an overt act in a conspiracy charge does not mean that such an allegation is required by the conspiracy statute on which the charge is based. A prosecutor may allege an overt act to show that venue is proper or to give the defendant notice of the nature of the evidence.[6] Similarly, an overt act may be proved at trial to establish venue[7] or the existence of a conspiratorial agreement.[8] In sum, any practice of alleging an overt act reflects only that most conspiracy prosecutions involve proof of an overt act, regardless whether such proof is required by the underlying conspiracy statute. See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 947 (1959).

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[6] See 2 W. LaFave & A. Scott, *supra*, § 6.4(a)(2), at 64-65, citing *Hyde* v. *Shine*, 199 U.S. at 76-78; *Model Penal Code*, *supra*, § 5.03, cmt. 5, at 452; Goldstein, *supra*, 68 Yale L.J. at 409 n.11.

[7] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-253 (1940) (although proof of overt act was not required to establish Sherman Act conspiracy, such proof was required to establish that venue was proper, when there was no proof that the agreement was formed in the district in which prosecution was brought).

[8] "[T]he prosecution is seldom able to present direct evidence of the [conspiratorial] agreement," 2 W. LaFave & A. Scott, *supra*, § 6.4(d), at 71, because "[s]ecrecy and concealment are essential features of successful conspiracy," *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947).

3. In *Nash* and *Singer*, this Court construed conspiracy statutes that did not contain express overt act requirements not to require proof of an overt act. See U.S. Br. 15-17. On other occasions, the Court has made clear that proof of an overt act is required under the general conspiracy statute only because such proof is expressly required by the text of that statute. See, *e.g.*, *Fiswick*, 329 U.S. at 216 n.4; see also *United States* v. *Feola*, 420 U.S. 671, 687 (1975). Thus, this Court's decisions "give Congress a formulary: by choosing a text modeled on [the general conspiracy statute], it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1 [at issue in *Nash*], it dispenses with such a requirement." *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 113 S. Ct. 509 (1992).

Respondent claims that the "continued persuasiveness" of *Nash* and *Singer* is "suspect," because they represent "an ill-advised expansion" of criminal conspiracy law. Resp. Br. 12, 17. He also claims that *Nash* and *Singer* subsequently "provoked strong cautionary language from this Court and from commentators." *Id.* at 12. He argues that "[s]ince the narcotic conspiracy statute at question was passed in the wake of this criticism, this Court should interpret the statute to require an overt act." *Ibid.* Respondent's argument is flawed at every step.

First, *Nash* and *Singer* did not expand the scope of criminal conspiracy law. In each case, the Court began with the premise that proof of an overt act was not required to establish a conspiracy at common law, and it then applied the canon of construction that when Congress uses a common law term in a criminal statute and does not define that term, it intends that term to have its common law meaning. See U.S. Br. 15-16. Both

the premise and the canon of construction underlying *Nash* and *Singer* were well established long before those cases were decided. See, *e.g.*, *Bannon*, 156 U.S. at 468; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 159-160 (1820). *Nash* and *Singer* thus broke no new ground in the field of criminal conspiracy law.

Second, this Court's subsequent decisions do not "thr[o]w" *Nash* and *Singer* "into question," as respondent asserts (Resp. Br. 17). Nothing in any of this Court's decisions suggests that *Nash* and *Singer* are no longer good law. To the contrary, the Court has reaffirmed the premise of *Nash* and *Singer* that proof of an overt act was not required to establish a conspiracy at common law. See *Collins* v. *Hardyman*, 341 U.S. 651, 659 (1951) ("a mere unlawful agreement or conspiracy may be made a federal crime, as it was at common law," citing *Nash*); *Fiswick*, 329 U.S. at 216 n.4, citing *Nash*.[9] One of those decisions, *Collins* v. *Hardyman*, was issued a few months before Congress enacted the first drug conspiracy statute in 1951 without including an express overt act requirement in that statute.[10] Thus, it is

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[9] See also *United States* v. *Howard*, 352 U.S. 212, 216 (1957) (citing *Singer* without suggesting that its continued vitality is in doubt).

[10] Significantly, the opinion for the Court in *Collins* was written by Justice Jackson, who was "no friend of the law of conspiracy," *Iannelli* v. *United States*, 420 U.S. 770, 778 (1975), and who wrote the opinion on which respondent relies most heavily in asserting that later decisions of this Court "threw into question" *Nash* and *Singer*, Resp. Br. 16-17, discussing *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). In another case decided the same Term as *Collins*, Justice Jackson observed that "no overt act is * * * required" under the conspiracy provision of the Smith Act, 18 U.S.C. 11 (1946), and he cited *Nash* as a decision that "upheld the power of Congress to adopt the ancient

fanciful for respondent to suggest that when Congress enacted the predecessor of Section 846, it "may very well have understood this Court as requiring an overt act unless explicitly stated otherwise." Resp. Br. 19.

Finally, regardless of the continuing validity of *Nash* and *Singer*, Section 846 should not be construed to require proof of an overt act. Even if Congress omitted an express overt act requirement from the original drug conspiracy statute in 1951, in the belief that the statute would be construed to require proof of an overt act by implication, Congress could not have held that belief in 1970, when it enacted Section 846. As of 1970, the lower federal courts had consistently interpreted the 1951 statute and a similar statute enacted in 1956 not to require proof of an overt act. See U.S. Br. 13-14. Congress's omission of an express overt act requirement from Section 846 suggests an intention to adopt that interpretation. Cf., *e.g.*, *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2213 (1992); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). That suggestion is reinforced by the fact that just 12 days before Congress enacted Section 846, it enacted another conspiracy statute in which it expressly required proof of an overt act. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 802(a), 84 Stat. 936 (proscribing conspiracy to obstruct enforcement of state laws to facilitate illegal gambling if "one or more of [the conspirators] does any act to effect the object of such a conspiracy") (current version at 18 U.S.C. 1511(a)); see also *Iannelli* v. *United States*, 420 U.S. 770, 788 (1975) (discussing legislative history of Act).

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common law that makes conspiracy itself a crime." *Dennis* v. *United States*, 341 U.S. 494, 574 (1951) (Jackson, J., concurring).

4. Respondent resorts, finally, to two principles of statutory construction, neither of which supports his position.

a. Respondent errs in asserting that "without an overt act requirement, * * * [Section 846] punishes a mental state without an *actus reus*," in contravention of "the venerable maxim *cogitationis penam nemo patitur*," Resp. Br. 19 (*i.e.*, "No one is punished for his thoughts," *Black's Law Dictionary* 259 (6th ed. 1990)). That maxim is not implicated by construing Section 846 not to require proof of an overt act. Even if an overt act need not be proved, the government still must prove an act: the act of agreement. See, *e.g.*, *Nash*, 229 U.S. at 378 (common law "does not make the doing of any act *other than the act of conspiring* a condition of liability") (emphasis added).[11]

b. Respondent also errs in relying on the rule of lenity. Resp. Br. 22-23. "[T]hat venerable rule is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted); see also, *e.g.*, *Callanan* v. *United States*, 364 U.S. 587, 596-597 (1961) (refusing to apply rule of lenity

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[11] See also 11(1) *Halsbury's Laws of England*, *supra*, ¶ 64, at 59 ("The actus reus in a conspiracy is therefore the agreement to execute the unlawful conduct, not the execution of it." (footnotes omitted)); 8 W. Holdsworth, *supra*, at 380 ("there must always have been an overt act of agreement or combination, so that a mere uncommunicated intention to conspire is not a conspiracy"); 2 W. LaFave & A. Scott, *supra*, § 6.4(d), at 70 ("[A]n essential element of every crime is an act (or omission). The crime of conspiracy might appear to be an exception to this general rule * * *. But conspiracy is not an exception, for the agreement itself is the requisite act." (footnote omitted)).

in construing conspiracy provision of Hobbs Act, 18 U.S.C. 1951). This is not such a case. It is clear from the text of Section 846 that proof of an overt act is not required in prosecutions under that statute.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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